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(27,181)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 426.

THE OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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Judd & Detweiler (Inc.), Printers, Washington, D. C., February 9, 1920.

1 Court of Claims.

No. 33183.

THE OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

On January 28, 1916 the claimant filed its original petition. Subsequently, to wit: July 8, 1918, by leave of court, the claimant filed its amended petition, which is as follows:

Amended Petition.

(Filed July 8, 1918.)

The Honorable Court of Claims:

The Oregon-Washington Railroad & Navigation Company, Claimant, respectfully represents:

I.

Claimant is a corporation duly organized under the laws of the State of Oregon, and as such corporation now is, and was during all the times hereinafter mentioned, engaged as a common carrier in the transportation of passengers and freight in and through various States of the United States, and, through connections with other railroad companies, between the points covered by the transportation services referred to herein. No part of the lines operated by claimant were constructed with the aid of grants of land by the United States.

II.

Under the Acts of Congress granting lands in aid of railroads and Acts of Congress regulating the expenditure of appropriations by the United States for Army transportation over such land-grant railroads, so far as same may be applicable, said land-grant railroads were required to transport troops and munitions of war and property of the United States at not exceeding fifty per centum of the rates paid by private parties for the same kind of service; but in none of said Acts were said land-grant railroads required, nor have they ever agreed, to transport at such reduced rates anything other than troops and munitions of war and property of the United States.

III.

At and prior to the times when the services hereinafter mentioned were performed, the railroad companies of the United States generally, including claimant, had severally agreed with the Quartermaster-General of the United States Army (subject to certain exceptions not necessary here to be stated) to accept, for the transportation of property moved by the Quartermaster's Department, United States Army, and for which the United States Government was lawfully entitled to reduced rates over land-grant roads, (i. e., property of the United States,) the lowest net rates lawfully available as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement.

3 Said agreements are known as "Land-Grant Equalization Agreements", and are set out in Circular No. 23, Quartermaster General's Office, 1911, dated November 15, 1911, and Circular No. 6, Office of the Chief, Quartermaster Corps, 1913, dated March 1, 1913, published by the Government.

IV.

Under the regulations of the War Department in force at the times hereinafter stated each and every officer of the Army, when changing stations, was entitled to the transportation, at the expense of the Government, of a certain weight of household goods or other personal property belonging to him, the weight being graded by his rank. Similar regulations obtained during the same time in the other Government Departments hereinafter referred to as to the transportation of like property and effects of officials of those Departments when changing stations; and Army officers upon assignment to station, or when changing station, were entitled to transportation, at the expense of the Government, of the number of private mounts (horses owned by them) for which they were entitled to forage, according to their rank.

V.

Within six years of the filing of the original petition herein, the United States, through the Quartermaster's Department of the Army, shipped as freight over certain railroads—claimant in each instance being the last carrier—certain weights of household goods and personal effects and other property of Army officers and other

4 officials of the United States changing station, the shipment in each instance being upon what is known as a Government bill of lading, calling for tariff rates, said bills of lading having been furnished by the Quartermaster's Department of the Army in accordance with a circular letter and forms prescribed and promulgated by the Comptroller of the Treasury and approved by the Secretary of the Treasury under date of October 29, 1907 (14 Comp. Dec., at p. 967, et seq.).

On the back of each of said Government bills of lading was printed (in accordance with the form prescribed as aforesaid by the Comptroller of the Treasury, 14 Comp. Dec. 971) the following, among other "Conditions and Instructions":

"Conditions.

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of freight charges will in no case be demanded by carriers. Upon surrender of this bill of lading duly accomplished payment will be made to the last carrier, except where otherwise specifically stipulated.

"2. For railway transportation this bill of lading is subject to all the conditions of the uniform or standard bills of lading, and for express shipments to all the conditions contained in the standard form of receipt issued by express companies, except as otherwise specifically provided herein.

"3. Shipments made upon this bill of lading shall take the rates provided for shipments made upon the uniform or standard bills of lading or standard receipts.

* * * * * * *

"Instructions.

"1. *Government property* [italics here ours] will be transported on the prescribed form of *Government Bill of Lading* which will be identified by serial numbers.

* * * * * * *

5 "3. When shipments are made under contract or special rates, notation of such fact should appear on the face of bills of lading.

* * * * * * *

"7. *Public property* [italics ours] may be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regulations. (23 Stat. 111.)

"8. Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. This bill then becomes the evidence upon which settlement for the service will be made. * * *"

Said Government bills of lading upon which the aforesaid shipments were made, and the "Conditions and Instructions" therein contained, embodied the well-established and long-continued prac-

tice of the United States and the common carriers by railroad in the United States, including claimant, by which shipments of freight by the Government over the railroads of the country (whether land-grant railroads or not) were accepted by the carriers without prepayment of the charges therefor and upon the understanding and agreement that, where no special rate was agreed upon, the service would be settled for, with the last carrier, upon the basis of the commercial or tariff rates with appropriate deductions on account of land-grant distance, as provided in the railroad land-grant Acts, and Army appropriation Acts of Congress so far as same were applicable, and the railroad Land-Grant Equalization Agreements, above referred to.

6 And claimant further says that, in accordance with the well-established and long-continued custom and practice of the parties, settlement for such freight transportation by the United States is and has always been treated and regarded by the United States and by said common carriers by railroad, including claimant, as a matter of accounting merely between the parties and not as determinative of the legal or contractual rights of the parties, or either of them, and that any error, either of fact or law, made by either of the parties in presenting or settling bills or vouchers for such freight transportation, if against the United States, was and is subject to correction by the Government at any time thereafter and the balance due the United States because of said error deductible from the amount due the carrier upon any subsequent bill or voucher before the accounting officers of the Government for settlement; and if the error were against the railroad company, the same might be corrected so long as settlement of the bill or voucher was within the control of the accounting officers of the Government, in view of certain statutory conditions and restrictions contained in 28th Statutes at Large, pages 205-211, but if control of the settlement had passed beyond the accounting officers of the Government, by reason of such statutory conditions and restrictions, the carrier was relegated to its suit in the Court of Claims to recover the balance due it for the transportation involved.

7 And claimant further says that in all such instances as are referred to herein, the compensation of the carrier was fixed by the aforesaid land-grant and Army appropriation Acts and said Equalization Agreements, as well as by the aforesaid Government bills of lading upon which the shipments were made (in the absence of any agreement to pay special rates, as was the case here), at the published tariff or commercial rates of the carriers concerned, less land-grant deductions when, and only when, authorized by said Acts and Agreements.

Prior to the commencement of this suit and for the period covered by the transportation embraced herein, claimant's auditors, erroneously and by mistake, rendered its bills or vouchers for the transportation of household goods and other personal property of Army officers and other government officials changing stations, shipped through the Quartermaster's department of the Army upon Government bills of lading, upon the basis of the tariff rates with deductions on account of land-grant distance involved, and claimant's

auditors so rendered its bills and vouchers for the transportation of that character embraced in this suit, although said deductions were not authorized or required by law or the bills of lading upon which the shipments referred to were made, and payment for said transportation was made by the United States only on that basis.

Claimant further says that, as it is advised and believes, its auditors and agents were led and constrained to render its bills and vouchers, as aforesaid for the transportation aforesaid, at tariff rates with land-grant deductions, because said shipments were for the Quartermaster's department of the Army and upon Government bills of lading which in terms are only applicable to "Government property" and "public property", and also the Comptroller of the Treasury (whose decisions are by law made final and controlling upon the Executive Departments of the Government) had held that such transportation, upon Government bills of lading, when within
8 the amount authorized to be transported by Departmental regulations at the expense of the Government, was quasi-public property and entitled as such to land-grant rates, per his decisions of June 29, 1901 (7 Comp. Dec. 852), October 13, 1904 (11 Comp. Dec. 174), and October 16, 1905 (12 Comp. Dec. 202), to which ruling the Comptroller of the Treasury adhered until the decision of the court in Chicago, Milwaukee & St. Paul Ry. Co. v. United States, 50 Ct. Cl. 412, decided February 8, 1915, wherein judgment was given to said company for the amounts deducted on account of land-grant distance from its bills for the transportation of the personal effects of Army officers within the change of station allowance.

Claimant further says that in rendering its bills or vouchers aforesaid for said transportation of officers personal property at tariff rates with land-grant deductions, and accepting payment on said basis, it did not waive nor did it intend to waive its right to payment in full for said transportation, nor was there any consideration for such a waiver, and claimant at all times intended to maintain and reserve its right to sue in this Court, if so advised, for the balances due it on account of said land-grant deductions, so far as the same were not barred by the statute of limitations, which right to sue it believed it was entitled to by law.

VI.

Annexed to the original Petition herein is a Statement showing in detail the items of transportation referred to in paragraph V of this petition and the balances due claimant because of deductions from
9 the tariff rates on account of land-grant distance made as aforesaid in settling claimant's accounts, and said statement is made a part of this amended petition by this reference. And claimant says that the total sum due it, as shown by said statement, because of the said land-grant deductions, is $4,600.67.

VII.

Wherefore claimant says there is now justly due and owing it by the United States the sum of $4,600.67 exclusive of all just credits

and offsets, for which it prays judgment, no assignment or transfer of said claim having been made.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,
By CHARLES H. BATES,
Its Attorney in Fact.

HARR & BATES,
Attorneys for Claimant.

10 DISTRICT OF COLUMBIA, *ss:*

Charles H. Bates, of the District aforesaid, being duly sworn, deposes and says: That he is attorney in fact for The Oregon-Washington Railroad & Navigation Company in the presentation of the aforesaid claim; that he has read the foregoing petition by him subscribed for and in the name of said Company, and is acquainted with the contents thereof, and that the matters and things therein stated are true, as he verily believes.

CHARLES H. BATES.

Subscribed and sworn to before me this 6th day of July, 1918.

ALBERT C. WEST.
Notary Public, District of Columbia.

[NOTARIAL SEAL.]

Power of attorney annexed to original Petition.

11 II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On April 1, 1919, this case was argued and submitted on merits by Mr. William R. Harr, for the claimant and by Mr. Horace S. Whitman, for the defendants.

12 IV. *Findings of Fact, Conclusion of Law and Opinion of the Court, by Downey, J.*

Filed May 5, 1919.

Findings of Fact.

I.

The Oregon-Washington Railroad & Navigation Co. is a corporation of the State of Oregon.

II.

Before any of the transactions involved in this suit, the railroad companies of the United States generally, the claimant company included, entered into certain agreements with the United States known as the "Land-grant equalization agreements," by which the carriers agreed, subject to certain exceptions not material here to be noted—

to accept for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement.

III.

Under the provisions of various acts of Congress by which lands were granted to aid in the construction of railroads, and in which acts certain reservations and restrictions were made or authorized to be made by Congress respecting the charges to be made for the transportation of troops, munitions of war, and military supplies and property of the United States, and under the provisions of the annual Army appropriation acts, beginning with that approved June 30, 1882, ch. 254 (22 Stat., 120), down to the present time, such land-aided roads were authorized and required to be paid, for Army transportation of the character above mentioned, not exceed-
13 ing fifty per centum of the rates paid by private parties for like or similar service, except that for the fiscal year 1892 the Army appropriation act of February 24, 1891, ch. 284 (26 Stat., 776), permitted a maximum amount of sixty per centum to be paid; and the practice of the executive departments of the Government, under said Army appropriation acts, has always been to pay said railroads, for such transportation, the maximum amount allowed by said acts.

IV.

Under the Army regulations in force during the whole period of the transportation service involved herein and theretofore every officer of the Army, when changing station, was entitled to the transportation, at the expense of the Government, of a prescribed weight of baggage belonging to him, the weight being graduated according to rank and materially larger in case of permanent change of station than in case of temporary change in the field. There were some changes in the regulations during the period, but they are not herein material.

It was provided that in changing station the authorized allowance of baggage should be turned over to the quartermaster for packing and crating and for transportation as freight by ordinary freight lines, and that the baggage to be transported at public expense, including mess chests and personal baggage, upon change of station, should not exceed amounts shown in a tabulation, ranging, in case of permanent change of station, from 15,000 pounds for a lieutenant general down through the ranks in graduated amounts to 6,000 pounds for a captain, with further graduations for officers of lower rank.

By another provision transportation of professional books was authorized in addition to the allowances above referred to, and by another provision transportation was authorized of private mounts intended to be used in the public service and not in excess of the number for which the officer was entitled to forage.

By the Army appropriation act of March 23, 1910 (36 Stat., 243–255), under the subhead "Transportation of the Army and Its Supplies," it was provided "That hereafter baggage in excess of regulation change of station allowances may be shipped with such allowances, and reimbursement collected for transportation charges on such excess," and thereafter it was provided in the Army Regulations that baggage in excess of the allowance would be shipped on the same bill of lading with the regulation allowances upon advance deposit with the shipping officer of a sum equal to the commercial freight charges on the excess.

The term "baggage" was not construed to limit the transportation to such personal belongings as travelers ordinarily carry with them, but was understood and construed to include household goods and other personal effects belonging to the officers and necessary to be transported for their use in the discharge of their official duties.

Similar regulations obtained during the same period in other Government departments.

V.

The transportation services involved in this case, rendered between January 7, 1910, and January 5, 1915, both inclusive, were rendered upon the usual Government bills of lading, the form and conditions of which were as follows:

SPECIMEN AND STANDARD FORMS.

<.....8".....>

[Form No. 1, obverse.]

<.....10½".....><.....3½".....>

Form No.....
Form approved by Comptroller of the Treasury....., 1907.
[device here.]
Government bill of lading.

No.....
DEPARTMENT OR BUREAU.

....., ..., 190
(Name of station.) (Date.)

Received from.....
(Consignor.)

y the.....company
(Name of transportation company.)

he public property described below in apparent good order and condition contents and value unknown) to be forwarded subject to conditions stated n the reverse hereof, from.....

).....by said company and its connections, here to be delivered in like good order and condition to.....
(Consignee.)

n.....
Route journey only when some substantial interest of the Government is subserved thereby.)

...ges.	Numbers.	Number and description of packages.	Contents.	Weights.		

.....*Agent.*

For.....
(Name of transportation company.)

Consignor's certificate of shipment.

_____, _____, 190
(Place.) (Date.)

I have this day shipped in accordance with this bill of lading the public property above enumerated.

Weight_____ lbs_____
(In words and figures.)

_____

_____
(Consignor.)

Consignee's certificate of delivery.

_____, _____, 190
(Place.) (Date.)

I have this day received from_____
Name
_____the above enumerate
transportation company.)
public property in apparent good ord
and condition, except as noted on th
reverse of this bill of lading.

Weight_____ lbs_____
(In words and figures.)

to be billed or vouchered to_____

_____
(Name and address of officer.)

_____

_____
(Consignee.)

[Form No. 1, reverse.]

No. _____

Bill of lading.

Payable from_____
(Appropriation.)

_____

Explanation regarding loss or shrinka
to be made by consignee, who will sta
all the facts available concerning the n
ture or extent of the loss or injury a
how it occurred.

_____

_____

_____

_____

_____

_____

_____

_____
(Consignee.)

_____

NOTE.—On these folds may appear such other information or instructions as may b
necessary for administrative purposes.

CONDITIONS AND INSTRUCTIONS.

CONDITIONS.

It is mutually agreed and understood between the United States and carrie
who are parties to this bill of lading that—

1. Prepayment of freight charges will in no case be demanded by carrier
Upon surrender of this bill of lading duly accomplished payment will be ma
to the last carrier, except where otherwise specifically stated.

2. For railway transportation this bill of lading is subject to all the cond
tions of the uniform or standard bills of lading, and for express shipments t
all the conditions contained in the standard form of receipt issued by expre
companies, except as otherwise specifically provided hereon.

3. Shipments made upon this bill of lading shall take the rates provide
for shipments made upon the uniform or standard bills of lading or standar
receipts.

4. No charge shall be made by any carrier for the execution and presentation of bills of lading in manner and form as provided by the instructions hereon.

5. The shipment is at "owner's risk," or released rates where the tariff provides lower rates on that account, and at "company's risk" where the tariff makes no such provision.

INSTRUCTIONS.

1. Government property will be transported on the prescribed form of *Government Bill of Lading*, which will be identified by serial numbers.

2. *Through bills of lading will be issued in all instances between initial and ultimate points except when rates more advantageous to the Government may be otherwise secured.*

3. When shipments are made under contract or special rates, notation of such fact should appear on the face of bills of lading.

4. Officers charged with the duty of providing or securing Government transportation should familiarize themselves with land-grant railroads in order that the shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing rates therewith.

5. Erasures, interlineations, or alterations in bills of lading will be authenticated and explained by the person making them.

6. Bills of lading should describe shipments of articles by their commercial names, giving separately such weights, dimensions, or values and manner of packing as may be necessary to ascertain classifications and rates and to enable recovery on loss.

7. Public property *may* be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regualtions. (23 Stat., 111.)

8. *Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. This bill then becomes the evidence upon which settlement for the service will be made.* Memorandum copies may be used at the discretion of administrative officers. Shipping orders shall be invariably furnished the initial carrier.

9. In no case will a second bill of lading be issued for any shipment, nor will a bill of lading be issued after the transportation has been performed.

10. In the absence of the consignee, or on his failure to receipt, the person receipting will certify that he is duly authorized to do so, reciting such authority.

11. In case the bill of lading has been lost or destroyed, the shipping officer will issue a certificate upon the application of either the carrier, the consignee, or the proper officer of the department, bureau, or office making the shipment. This certificate will be frowarded to the consignee, who will indorse thereon his certificate as to the receipt of the property and its condition. This certificate shall then become the substitute for the bill of lading, and payment may be made thereon. Record should be made of the loss of the bill of lading and of the issue of a certificate. The shipping officer will not give his certificate until he is satisfied himself, by correspondence with the consignee and the proper officer of the department, bureau, or office controlling the shipment, that the bill of lading is not in their possession. He will also require proper evidence of the carrier that the bill of lading is not in its possession and can not be traced by it, and a statement that if subsequently found it will be at once surrendered to the United States without demand. In case the bill of lading should subsequently be recovered, proper record will be made thereof and the bill forwarded to the proper officer.

12. To insure prompt delivery of property in the absence of the bill of lading, the consignee may give to the carrier a receipt for the property actually delivered, which will state that it is given because the bill of lading has not come to hand. On the recovery of the bill of lading, or when the certificate provided for above shall have been given, the receipts will be recovered and destroyed by the officer who issued it.

13. In case of loss or damage to the property while in the possession of the carrier, such loss or damage should, when practicable, be noted on the bill of lading before its accomplishment. All practicable steps should be taken at that

time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer all evidence as to the same.

14. If the number of articles to be shipped be too great for the blank form, additional leaves or bills should be used and so attached and designated as to form but one bill, under one number. Additional instructions, not conflicting with the foregoing, may be added by any department, bureau, or office for the guidance of its officers. Additional information required solely for administrative purposes will appear on the brief and second fold.

No express contracts otherwise were made for the transportation here involved and no special rates were noted on the bills of lading.

Bills of lading covering shipments of the class here involved were "supposed" to carry notations informing the carrier of the nature of the shipment. Sometimes the designations were "household goods of officer" or "household goods." In "recent years," how recent not shown, the notation was in form "Property of Capt. Brown" or some named officer. Household goods "were usually billed in care of the officer entitled to receive the same" and the bills showed the officer "changing station." The exact form of notation on the bills of lading for the shipments here involved is not specifically shown and whether there were notations on all bills does not appear. It was the practice to put some appropriate notation on the bills. The bills here involved are not in evidence.

It is not shown that plaintiff was ever deceived or misled as to the character of these shipments and the evidence does not justify a finding that plaintiff's officer charged with the duty of presenting and collecting claims for the transportation here involved ever believed or had reason to believe that the property transported was Government-owned property.

VI.

In rendering its vouchers to the defendant for the transportation referred to in this case the claimant company made deductions on account of land grant from the amounts which would have been due therefor at commercial or tariff rates, and claimed only the balance, accepting payment in the sums so ascertained and claimed without protest.

The accounts were stated on the Government form of voucher for transportation of freight subject to land-grant deductions and were certified by plaintiff's auditor to be correct and just and were presented to and paid by the Government's proper disbursing officer, the amount paid equaling the ascertained and shown total of the amounts stated in the column headed "amount claimed."

The instructions upon this voucher form required that it should be completely filled in by the payee before certification and that there must not be any erasure or other alteration. If a voucher presented to a disbursing officer for payment was found to be erroneous in any respect the errors were noted thereon and the voucher returned for restatement. Restatement was accomplished by the preparation and certification of a new voucher with the error corrected.

The form of voucher referred to and used in the presentation of accounts for the services here involved was as follows:

Form No. 20 (Q. M.)
Approved by the Comptroller of the Treasury June 15, 1912

PUBLIC VOUCHER

FOR TRANSPORTATION OF FREIGHT

(LAND GRANT)

Transportation Co.'s Bill No......

Appropriation: .....

Voucher No......
Symbol No......
General Account.....
Detail Account.....

THE UNITED STATES,
To ..... Dr.

Address.....

Class symbol.	Date, 191	Bill of lading number.	From—	To—	Total distance.	Miles of land-grant road.	Class or commodity.	Weight.	Rate.	Gross amount.	Amount to be deducted account of land grant.	Amount claimed.	Payee must not use this column. Notations.
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Total.....													

I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received; and that the rates charged are not in excess of the lowest net rates available for the Government, based on tariffs effective at date of service.

Examined by

*(Do not sign in duplicate.)

Payee.....

(Bill must be completely filled in by payee before certification, and there must not be any erasure or other alteration whatever.)

I certify that the above services were rendered as stated; and that they were necessary for the public service.

....., 191

Title.....

(Any notations made in spaces provided therefor on back of this voucher become a part of this certificate.)

Approved for $.....

Title.....

Paid by check No....., dated ....., 191 , on .....
Treasurer of the United States at....., in favor of payee named.

*Where a voucher is certified by a corporation or company, the name of the person writing the corporate or company name, as well as the capacity in which he signs, must appear. Example: "Chicago Edison Company, per John Smith, Secretary," or Treasurer, or Member of Firm, as the case may be.

OBSERVE INSTRUCTIONS ON REVERSE HEREOF.

OREGON-WASHINGTON R. R. ETC., VS. UNITED STATES. 13

*Public Voucher No.*_____

_____DEPARTMENT

OFFICE OF_____

APPROPRIATION:

_____
(State full title of appropriation.)

*Amount, $*_____

IN FAVOR OF

_____
(Name of payee.)

FOR TRANSPORTATION OF FREIGHT
(Land grant.)

ACCOUNTS OF

_____
(Name of disbursing officer.)

*Disbursing*_____
(Clerk or agent.)

_____
(Place where located.)

_____, *191*
(Period for which account is rendered.)

INSTRUCTIONS.

1. Transportation companies, when billing on this form, are requested to indicate on accompanying bills of lading, opposite each item, the class or commodity rate applied, and refer to the tariff used. Where payment is demanded for a full car load or loads, the designation of the car by name and number should be shown, with the items shipped in each car. Where payment is demanded for services in a particular car or kind of car, the shipment by proper authority from initial point to destination in said car should be shown.

2. When additional charges, such as drayage, wharfage, tolls, etc., are made a part of this account, they must be stated separately on this form, and, if paid to other firm or corporation, to be supported by receipt.

3. Payment for transportation of freight will be made to the last carrier, unless otherwise provided in the bill of lading, upon this voucher form, accompanied by its corresponding accomplished bills of lading, and only for the quantity of stores delivered at destination, except that in case of loss of weight from natural shrinkage en route the weight shipped, as shown by the bill of lading, will be paid for, provided packages are delivered intact. Loss or damage for which a carrier is responsible will be deducted in making settlements for the services.

4. Separate forms will be used in billing transportation furnished for each bureau, office, or service of the respective Government departments.

5. All notations for purely administrative purposes will be made elsewhere on this form than in the bill rendered by transportation companies.

20 For the transportation here involved and for like transportation theretofore, claims for which were stated in the same way, the plaintiff company and its predecessor company, whose properties, franchises, and accounts it acquired, charged upon its books the net amounts determined as above stated and claimed in its vouchers and no more, and upon payment of an amount thus claimed and charged as to any shipment the transaction was regarded as (quoting the language of the company's auditor) "behind us."

VII.

For the transportation of the authorized change of station allowance of baggage, including household goods and other personal property of officers of the United States Army and other Government departments changing stations within the period here involved and within six years of the filing of the original petition herein, for which settlements were made by disbursing officers shortly after the services were rendered, the plaintiff, as last carrier, claimed and was paid by the United States rates arrived at by deducting from the lawful rates filed with the Interstate Commerce Commission the amounts authorized to be deducted by reason of the land-grant acts and the provisions of the applicable annual Army appropriation acts relating to the transportation of Government property over land-grant railroads.

Of the items of transportation set out in plaintiff's exhibit filed with its complaint herein, which number 176, 154 were for the War Department of Army officers' effects on permanent change of station, 10 were for the Marine Corps, 1 for the Navy, and 11 for miscellaneous branches of the public service.

Upon the shipments herein involved the difference between the amounts thus claimed and paid and the amounts the plaintiff would have received if paid at lawful tariff rates without land-grant deductions is $4,228.01. Of this sum, $204.59 is a difference occurring as above stated, on the transportation of Army officers' private mounts referred to in Finding IV.

VIII.

The Oregon-Washington Railroad & Navigation Co., plaintiff herein, and the Oregon Short Line Railroad Co. and the Union Pacific Railroad Co., plaintiffs in similar suits submitted herewith, compose what is known as the Union Pacific System, although such relation did not exist at the time in 1901, hereinafter referred to. None of said roads were land-aided railroads, but they were parties to the equalization agreements referred to in Finding II.

In rendering their accounts to the United States for the transportation of the property and effects of Army officers and other Government employees changing station within the weights authorized to be transported on Government bills of lading at the expense of the United States, said companies, prior to the time referred to in 1901, rendered all said accounts at net cost or land-grant rates, i. e. commercial rates less land-grant deductions, following what

they understood to be the practice of the land-grant
21 roads in this respect. But in 1901 the Union Pacific stated a claim against the United States at regular tariff rates for transportation of household goods and professional books of an officer of the Army over the railroad bridge at Quincy, Ill., and claimed regular tariff rates for such transportation. The auditor disallowed the claim, allowed the rate per mile paid to the railroads leading to the bridge, the railroad company appealed to the Comptroller of the Treasury, and the comptroller affirmed the action of the auditor. The claim as made and the action of the auditor are stated in the comptroller's decision as follows:

The railroad company claims that the Government should pay regular tariff rates on the private property of an Army officer transported over the Quincy bridge on a Government bill of lading.

The auditor, in settlement above indicated, for the transportation of the regulation allowance of the household goods and professional books of an Army officer, allowed for the Quincy bridge the regular rate per mile paid to the railroads leading to the bridge and disallowed the excess.

After this decision and, so far as shown, except for this particular account, the Union Pacific again stated its accounts for the transportation of officers' effects at land-grant rates. It is not shown that plaintiff company ever changed its method of stating these accounts because of this claim by the Union Pacific or during its pendency, but after said decision all of said companies continued to state their accounts at land-grant rates and accept payment at such rates without protest and continued so to do until shortly after the decision by this court of the Chicago, Milwaukee & St. Paul Railway Co. case, February 8, 1915. In that case, which was decided without opinion, and the findings in which are not published, this court rendered judgment in favor of the plaintiff for deductions made from commercial rates, on account of land grants, in making payment for the transportation of officers' effects. Findings I and II in that case were formal as to the corporate capacity of the plaintiff and equalization agreements. Finding III was as to the Army regulations and Finding IV was as follows:

In making payment to claimant for the transportation of the effects of certain officers since November 27, 1908, the accounting officers of the Treasury made deduction, from the amounts due for said transportation at ordinary commercial rates, on account of land grants, and paid to claimant only the same rates as were due to be paid for the transportation of property of the United States.

By reason of said deductions as shown in the appendix to the original petition filed herein, claimant has been paid four thousand four hundred and three dollars and eighty cents ($4,403.80) less than it would have received had it been paid for said transportation at the ordinary commercial rates.

Upon these findings judgment was rendered for $4,403.80. This suit, decided February 8, 1915, was commenced November 9, 1914.

After being informed, at a subsequent date not shown, of the decision of this court in that case the plaintiff stated its accounts for this

class of transportation at full commercial rates, but on June 30, 1915, in a case appealed from the auditor to the comptroller by another railroad the comptroller held that notwithstanding the decision of this court and because of specific limitations on the use of the money appropriated by Congress in the Army appropriation act for "transportation of the Army and its supplies," from which appropriation this class of service was payable, the accounting officers required to consider the availability of appropriations could not pay more than 50 per cent of commercial rates, which was land-grant rates, and thereupon plaintiff resorted to the practice of stating its bills
22 at land-grant rates and continued so to do until after the passage of the Army appropriation act of June 30, 1917, in which it was provided that the limitation on the use of the appropriation should not prevent the accounting officers from making full payment to land-grant roads for transportation where the courts have held that the property transported does not come "within the scope of the deductions provided for in the land-grant acts."

All of the transportation here involved was furnished and the accounts therefor stated before the decision of the Chicago, Milwaukee & St. Paul case.

IX.

The Union Pacific lines, of which plaintiff company is one, have been represented in Washington by the same attorney since November, 1901. Said attorney had for 10 years or more theretofore represented the Southern Pacific lines in Washington either as attorney or in association with their attorney. He is one of the attorneys of record in this case. His employment was in looking after the collection of compensation from the Government for transportation services and in assisting in the adjustment of disputes between the companies and Government officers, and these companies, plaintiff included, looked to him for advice as to the bringing of suits in the Court of Claims for disallowances made by the accounting officers or for balances due the companies.

The matter of land-grant deductions on this class of transportation first came to the particular attention of this attorney soon after the passage of the Army appropriation act of February 24, 1891, and in personal conversation with the first and second comptroller about that time he expressed the opinion that land-grant deductions should not be made except when the freight transportation was payable from the Army transportation appropriation, and the freight was the property of the United States, and that the personal property of Army officers was not such property. No appeal by the roads represented by him was then pending before either comptroller, nor was the question as to the rate to be applied to officers' personal effects then before them, but from statements then made and former decisions he came to understand that the accounting officers would apply land-grant rates to shipment of officers' effects on change of station, and he was informed by the then comptrollers with whom he discussed the matter, that if not satisfied with decisions, his redress was in the courts.

None of the roads represented by him rendered any bills for such transportation at commercial rates until the claim passed on in the Quincy Bridge case was so stated, and claimed as to bridge transportation by the Southern Pacific. In 1904 he sought to have the comptroller change the holdings as to the class of transportation subject to the restrictions of the act of 1891. The matter then before the comptroller involved other than Army transportation payment for which was not made from the Army appropriation, and no question was then before him as to the rate on Army officers' effects on change of station. In his decision the comptroller said:

If this were a new question, one that had not been passed upon time and again by my predecessors, I might take a different view of the meaning of the acts upon which they predicated their decisions. But to say that because I, at this late date, am not able to clearly see the reasons which actuated those whose duty it was to construe these laws, as they no doubt saw them, that because I can not so see them, that their construction is clearly wrong, is asking too much and giving too little respect to precedent. I am, therefore, constrained to affirm the decision of the auditor.

The Court of Claims is only in a modified sense bound by these precedents, and if these constructions have been wrong all these years the railroads are not without remedy and have not been for all these years.

Whether said attorney advised his clients that in his opinion the comptroller's holding, as he understood it, was incorrect, and that their remedy was in the courts or what view the plaintiff took, if it was so advised, does not appear from the evidence. The plaintiff continued to state and render its accounts, as elsewhere shown in these findings, and until the beginning of this suit has not questioned in any court the correctness of the settlements of its accounts as rendered. As to amounts involved the question was not then of so much importance as it became after 1908, because until their bonded indebtedness was paid off, the larger part of such transportation was over the bond-aided roads.

Conclusion of Law.

On the facts found the court concludes as matter of law that the plaintiff is not entitled to recover and that its petition ought to be, and it is, dismissed.

Opinion.

DOWNEY, *Judge*, delivered the opinion of the court:

This action is for the recovery of various amounts, aggregating $4,288.01, in addition to those paid on account of 176 items of freight transportation furnished to and paid for by the United States. One hundred and fifty-four of these movements were for the War Department of the effects of Army officers changing station, 10 were for the Marine Corps, 1 for the Navy, and the remaining 11 for other branches of the public service. All the payments were made by dis-

leasing officers on vouchers certified to be correct and presented to them by the plaintiff. The vouchers, in addition to other data called for by the prescribed form which is in the findings, including weights and rate, stated the "gross amount" deduced therefrom, the amount deducted on account of land grant and, in the final column, the remainder, after such deduction, as the "amount claimed," they were all paid in the full amount claimed and such payment was accepted without protest. This action seeks to recover the difference between the amounts thus claimed and paid and the amount the plaintiff would have received had payment been claimed and made at commercial rates without any deductions on account of land grant, and the claim is for a sum as to each item of transportation in addition to that already claimed and paid as claimed for the same items and is not for any other or different or additional service nor for omitted items. The case therefore involves not only the question of the applicability of land grant rates to this class of freight transportation, a question already decided adversely by this court, but it involves further questions as to the right, under the circumstances of the case, to now recover amounts not then claimed. The findings are quite full as to the facts, much fuller, we fear, than is justified, for, in an effort to give the plaintiff the benefit of all of its voluminous requests for findings which seemed to even approach propriety, we
24 have likely incorporated matter beyond the proper scope of findings of fact. Some statements are accounted for by the fact that suits by other railroads mentioned are submitted with this one and one set of requests are made applicable to all.

The case seems to us to be clearly within the holding of this court in Baltimore & Ohio Railroad Co. v. United States (52 C. Cls. 468). The opinion in that case is lengthy, citing quite liberally from the authorities and we desire to do more than merely refer to it in the usual way as an authority in support of what is said here. We reaffirm what is said in that opinion on the question here involved, call attention to the authorities cited and to avoid lengthy repetition we treat it not merely as an authority but as a part of this opinion to be supplemented as further consideration and the facts of this case may justify.

The question as to the applicability of land-grant rates to this class of transportation may be regarded as settled adversely by the Chicago, Milwaukee & St. Paul Ry. Co. case decided by this court February 8, 1915. In the opinion in the B. & O. case we called attention to the fact that the questions there discussed were not presented to or considered by the court in the Chicago, Milwaukee & St. Paul case but we did not call attention to the findings in that case on which judgment was rendered, as we perhaps should have done. They are the findings of fact upon which the judgment was rendered and they show that the amount for which judgment was rendered was the amount of deductions made by the accounting officers of the Treasury from the amounts due for the transportation at ordinary commercial rates, a radically different case from that with which we have here to deal.

This statement prompts the suggestion that in dealing with ques-

tions such as we here have for consideration the distinction between disbursing officers and the accounting officers of the Treasury must always be in mind and, one step further, action by neither nor both of these classes of officers must be permitted to obscure the independent right of access to this court. Disbursing officers and accounting officers function along their own particular lines. They are related in that the accounts of the former must be submitted to the latter for settlement and in that a payment by a disbursing officer contrary to the holding of the comptroller as to the propriety of payments from the accountable funds which have been advanced to him will likely subject him to a disallowance by the auditor in the settement of his accounts, but there is jurisdiction in the accounting officers not possessed by the disbursing officers and a difference in the method of presenting claims. For the purposes of the discussion in the B. & O. case the distinction was not drawn or required as here.

During the period covered by the transportation involved in this case and for many years theretofore there were three methods finding authority in the law or in regulations or arising out of established governmental practice either of which might have been resorted to by the plaintiff and other railroads to secure compensation for services rendered, viz:

25 1. Presentment of claim to a disbursing officer for payment. This was the method pursued in this case. It has its chief advantage in that prompt payment is secured. Claims presented to a disbursing officer for payment must be upon a prescribed form, properly certified as to correctness by the claimant, and will only be paid when stated in the amount the officer is authorized to pay, since they must be used by the officer as his acquittances in rendering to the auditor his accounts as to expenditures from funds advanced to and charged against him. A disbursing officer will only pay when he understands he is authorized to pay under the decisions of the Comptroller of the Treasury, for such decisions will be applied by the auditor in examining his accounts and payments made in contravention thereof will be disallowed.

2. Presentment to the proper auditor for direct settlement. By this method claims may be presented for any amount or at any rate deemed proper by the claimant and the auditor may allow or disallow the whole claim or allow in part and disallow in part. The claimant may appeal to the comptroller for a revision of the action of the auditor in disallowing all or any part of the claim. The decision of the comptroller is conclusive on the executive branch of the government.

3. Suit in the Court of Claims. The Court of Claims has and for many years has had jurisdiction to determine the rights of claimants in cases of the character here involved and to render judgment irrespective of any decision by the Comptroller of the Treasury.

It appears that seven-eights of the transportation in question in this case was for the War Department and of officers' effects within the change of station allowance and the discussion has been addressed

entirely to this class of transportation. The other in minor amounts follows although as to it we have not been furnished with but left to our own resources as to regulations. It may be said that all the cases center around and are presented because of the transportation of Army officers' effects on change of station.

This class of property was first authoritatively determined not to be Government property within the meaning of the land-grant acts on February 8, 1915, when this court rendered judgment in the Chicago, Milwaukee & St. Paul case. That action was commenced November 9, 1914. Up to that time no railroad company had ever brought an action in this court to recover commercial rates for such transportation, and this plaintiff never brought an action until the instant case was commenced January 28, 1916.

The United States, in moving troops always and of necessity moved their equipage and supplies. That was Government-owned property. When an officer was required under orders to make a permanent change of station it was recognized that there were certain effects necessary for his use in the discharge of his official duties which, because not furnished by the Government, he must furnish for himself and which would exceed in weight the amount which could be carried by him in the regular way as baggage, and the right was granted him to have a limited weight of such effects called "baggage" transported to his new station at Government expense. The Gov-
26 ernment assumed this obligation just as it obligated itself for the expense of his personal transportation. There were regulations to that effect in force before there were land-grant railroads such as we here deal with. When land-grant transportation commenced this class of property was transported at land-grant rates without distinction in that respect between it and Government-owned property, and it does not appear, either in this case or from an examination of records and decisions, that there was any controversy over the matter. Rather is the inference authorized that it was a mutual construction of the rights of the parties.

In the B. & O. case much stress was laid upon the contention that the comptroller had decided that the transportation of such property was subject to land-grant deduction and we therein said that we had not been referred to any decision of the comptroller and that an exhaustive search indicated that there had been no decision on a disputed question so holding. Of course, the different comptrollers had always entertained that view and applied that rule, as was well understood, but there had been no holding to that effect in an official decision wherein the specific point was contested, the fact cited going not to the question as to whether that was the view of the comptrollers and the rule applied by them, but to the point that the railroads were not, in an official way at least, contesting but were acquiescing in that view. A decision of the comptroller as late as 1904 (11 Comp. Dec. 174) was cited wherein the Illinois Central Railroad Co. appealed to the comptroller from a decision of the auditor applying land-grant rates to the excess over the regulation allowance of an officer changing station, the comptroller holding that the excess was not subject to land-grant deduction, and wherein the railroad company made no

question as to the regulation allowance, although the question was there if it cared to present it, but confined its contention to the excess, in effect conceding the correctness of the rule as to the regulation allowance.

We have given plaintiff's counsel the benefit of requested findings, of very doubtful propriety, as to conversations with the comptrollers beginning in 1891, at which time he testifies his attention was first called to the matter, and of the requested fact that from statements made to him and former decisions he came to understand that the accounting officers would apply land-grant rates to this class of transportation and that he expressed a contrary view. Let us see what is to be inferred from and where we are led by the facts presented.

We should perhaps recall in this connection and for possible desired reference hereafter that by Army appropriation acts in 1874 and 1875 Congress had prohibited any payments from the appropriations made to land-grant roads but authorized suit in the Court of Claims, which followed by two railroads and, on appeal, the question involved was decided by the Supreme Court (93 U. S., 442). The bill of particulars filed in this court in one of the cases, there being no itemized bill in the other, contains a list of the property transported for which compensation was sought and of some interest is the fact that amidst a mass of items of Government-owned property, presumptively, are items of "baggage" and "private
27 baggage," without distinction in the plaintiff's asserted rights with reference thereto. Thereafter Congress, in the Army appropriation act of June 30, 1882 (22 Stat., 117) provided for the payment for "Army transportation," due to land-grant roads under the decision of the Supreme Court, limiting the payment to 50 per cent of tariff rates, to be accepted in full and providing "that any such land-grant roads as shall file with the Secretary of the Treasury their written acceptance of this provision shall hereafter be paid for like services as herein provided." The same provision was repeated in the deficiency act of August 5, 1882 (22 Stat., 257–262), and on May 2, 1883 (First Comptroller Lawrence held that—

> This statute was evidently designed to make all laws to conform to the decision of the Supreme Court and to make payment for all services accordingly, any doubt which might arise upon the language of the statute is to be resolved in favor of making it conform to the decisions of the Supreme Court * * *.

The Army appropriation act of February 24, 1891 (26 Stat., 776), repeated the above provision as to payment of amounts due and provided for payments out of the appropriation for "Army transportation" to land-aided roads at rates deemed just and reasonable by the Secretary of War not exceeding 60 per cent of commercial rates, limited in later acts to 50 per cent. Second Comptroller Mansur, October 26, 1893, referring to the decision of First Comptroller Lawrence, held that the provision in question "was intended to cover all property transported on behalf of the Government."

It is these decisions that counsel refers to as confirming him in the belief that if the comptrollers would hold that Government transpor-

tation not payable out of the Army appropriation was subject to land-grant deductions they "certainly would require land-grant deductions to be made from all transportation charges payable out of said Army appropriation acts, *as were household goods and other personal property.*" (Italics ours.) Much later, in 1904, when counsel "sought to have the comptroller change the holding of his office" as to the class of transportation to which the restrictions of the act of 1891 applied, the question before the comptroller, presented by a company represented by this counsel, was as to transportation not payable from the Army appropriation. The recital is unfortunately lengthy but the situation presented and the conclusion forced goes to the merits of counsel's theory. If when he was having conversations with the comptrollers in 1891 and subsequently, with these holdings as the text, he contended that land-grant rates were not applicable to movements of Army officers' effects changing stations, and by our findings we import verity to his statement in that respect, he was discussing purely a moot question for it was not before either of the comptrollers in either of the cases referred to.

It may be concluded that the purpose in presenting these facts by counsel's own testimony and requesting findings based thereon is to establish, first, the understanding that the comptrollers would hold this class of transportation subject to land-grant deduction, second, nonacquiescence by him in the correctness of the holding, and, third, the futility of seeking compensation at other than land-grant rates at the hands of disbursing or accounting officers.

The first proposition may be conceded. And, further, it may be taken as settled, irrespective of specific decision, that it was
28 the view of all the comptrollers that this class of transportation was subject to land-grant deductions, that wherever they have referred to the question they have so stated and that that view of the law by them was well understood by everybody having to do with such matters.

The second proposition, if to be regarded as a proper subject for discussion, leads us too far into the personal equation. The personal opinion of one standing in the relation of local attorney to railroad companies having their usual quota of executive and legal officers surely can not avail against an established line of conduct extending over a long period of years. The strength and value of that opinion is to be considered in the light of uninterrupted practice by the employer and the fact that although employed to look after the collection of compensation due from the Government and looked to to advise as to suits for disallowances and for balances due, it does not appear whether the client was ever informed of the personal opinion entertained or whether suit was ever advised. If so the client must have disregarded the opinion as well as the advice, for it continued through many years to claim only land-grant rates and did not avail itself, if not satisfied therewith, of its right to test the question in the courts. Under such circumstances the plaintiff's course of conduct is the determining factor and the personal opinion of counsel is not for consideration.

As to the third proposition, what can it now avail plaintiff to assert

the futility of demanding a different rate at the hands of disbursing or accounting officers? Many times, in the argument of cases of this character, have we heard it urged that the railroads, in presenting their claims to disbursing officers for payments were in effect forced to present them at land-grant rates, because the disbursing officers would not pay on any other basis, and so, in this case, we are told that the railroads "merely billed the Government for what they understood the accounting officers would voluntarily pay, reserving their right to sue for the amount deducted on account of land grant." More confusion of disbursing officers, accounting officers, and "deductions."

So far as the claims in this case are concerned we are not dealing with the accounting officers nor with "deductions" in the sense in which that word is used in association with the acts of those officers and the distinction is important to be borne in mind. We talk of deductions or disallowances when claims are presented to auditors for settlement and when, in this class of cases, claims having been made at full commercial rates there is a "deduction" by the auditor of the amount of land grant and a "disallowance" of that much of the claim. All the deductions there were in these cases were made by the claimant before the claim was presented and they were simply mathematical processes necessary to determine the "amount claimed." A commercial or full tariff rate must be used as the basis of determining, by computation and deduction, a land-grant rate and the data required to be shown on the voucher under "distance," "miles of land grant," "weight," "rate," "gross amount," and "amount to be deducted" are simply the elements entering into the determination and for verification of the correctness of the "amount claimed." There was no reservation of any kind and no protest when payment was made, and it may be conceded that as pay-
29 ment was made of the full amount claimed there was then no room for protest. Under these circumstances plaintiff is maintaining that it can, for a long period of years, acquiesce, by its every action, in the views of Government officials as to the basis on which it is entitled to be paid for such services, state its accounts continuously on that basis, certify the correctness of the amounts claimed and claim no more, receive payments in full of the amounts claimed, close its books as to the separate transactions and after many years of such procedure, not by reason of any successful showing as to a misapprehension of the facts but because of some indefinite sort of an alleged mental reservation, procure an additional payment not theretofore claimed on account of the same service, and that too after some other company has contested and established a right under a different procedure.

We think the proposition answers itself. But aside from the situation as thus presented and notwithstanding counsel's assertions as to his own belief in the matter, we can but conclude from this long-continued uniform course of action by plaintiff that during all those years it had no intention of claiming anything more as to these transactions than that claimed in the certified vouchers and paid. All the facts justify this conclusion, for a course of conduct is more potent

than assertions of belief unacted on. But if such a conclusion were otherwise subject to question it appears from the evidence that the plaintiff's charge upon its books was only of the amount claimed in its vouchers and that when that amount was paid "the transaction was behind us." The quoted language is the language of plaintiff's auditor.

Applying the conclusions in the B. and O. case and the stated reasons therefor and the authorities cited this case might well rest here, but we are met with so much of contention on various propositions not only in this but in other cases of like character now under submission, we are prompted to attempt to cover the whole field.

The different methods of asserting claims against the Government have been outlined. We may assume that railroad companies, having so much to do with such matters and having employees whose duty it is to look after them not only should but in fact do understand them. It is argued to us, in attempts to escape the effect of past performance, that in stating vouchers for payment by disbursing quartermasters there was no option but to state them at land grant rates because such officers would pay them only when so stated and, ergo, such method of statement was compulsory. The argument is without force. We have shown, we think, that they were in fact so stated because that was all that was claimed and there was no intention to claim more, but if in fact the plaintiff believed more was due and intended to claim more it could easily do so by presenting its claim to the auditor instead of the disbursing officer and in so presenting it it could claim commercial rates or whatever it saw fit to claim.

As to this procedure it is argued that it would have been fruitless because the auditor would have made the settlement at land grant rates, disallowing the excess, and it was understood to be useless to appeal to the comptroller. True enough; and so far as payment was concerned the result would have been the same. But plaintiff, thus securing for itself the same actual payment, would have been in the attitude of asserting, through the proper channels, its cl[illegible] to compensation at a different rate, it need not have appealed to the comptroller if it regarded it as a vain thing, and the doors of this court were always open to it to test its right to recover what it had claimed and been refused and to establish by precedent its rights as to future transactions. It would then have been in the attitude of suing for something it had claimed and which had been refused it by the auditor and not of claiming something more on account of closed transactions as to which its course for many years had conformed to established practice and as to which it had been paid all it claimed.

In this connection we call attention, without repetition, to what is said in the B. & O. case on the subject of estoppel, equitable or quasi, the splitting of causes of action, the mistake, if mistake there was, as a mistake of law and not of fact, the necessity, particularly in Government matters, that there shall be finality and an end to accounting and the authorities cited. In connection with the authorities cited in that case much is now made in the argument of the cases

before us, of the fact that we failed to cite therein two cases decided by this court, viz: Great Northern Railway Co. v. United States (42 Ct. Cl. 234), and Finney v. United States (32 Ct. Cl. 546.) The first of these cases seems to us to have involved a mistake of fact as to the land-aided character of the 2.18 miles of road involved. In the second, carefully considered, we find nothing in conflict with the views expressed in the opinion in the B. & O. case or in this opinion. Rather, by reason of the facts does it tend to confirm them. But what if it be conceded that there are authorities tending to support different conclusions than those arrived at in that case, there are other authorities, we know, which might have been cited in support of the conclusions reached, there are doubtless many others which our limited resources did not develop and it is but in line with our common experience to find authorities apparently in support of both sides of a proposition. We accept, in such circumstances, the weight of authority applicable to the case in hand.

In the B. and O. case we discussed, as to the accounting officers, the effect of the presentment of a claim and acceptance of payment upon an attempt to thereafter assert a demand for further compensation growing out of the same transaction, except in case of fraud or mistake, and suggested the application of the principle when resort is had to this court. It did not occur then to suggest the application of the same principle in this court, not merely by analogy, but by the specific provisions of sections 178 and 179 of the code, repeating the provisions of sections 1092 and 1093, Revised Statutes. Section 178, provides that payment of the amount due by any judgment of this court shall be a full discharge of all claims touching any of the matters involved in the controversy, and section 179 provides that any judgment against a claimant shall bar any further claim arising out of the matters involved in the controversy. The plaintiff could not, as to any transaction involved herein, present a claim to an auditor at commercial rates and, on allowance of the claim less land-grant deductions, accept the amount allowed and have his appeal to the comptroller as to the balance. This is not mere accounting practice, it is the law (the Dockery Act, section 8, 28 Stat. 208). It should be self-evident that it can not nullify the law by claim-
31 ing and receiving from a disbursing officer what it understood the officer would voluntarily pay and have adjudication by the accounting officers as to a further sum. Likewise it is apparent, not only on principle but by express provision of statute that it could not, in this court, sue for compensation on a land-grant basis recover its judgment and accept payment and, afterwards, perchance after another decision in another case, sue for additional compensation as to the same transaction. The whole Government scheme as to determination and payment of such claims is involved in these three authorities, disbursing officers, accounting officers, and courts, and it would seem entirely subversive of fundamental principles to hold that a course of conduct which would be conclusive as to a part of the system finds some sort of a hiatus therein beyond which it is relieved from the effects of its course of conduct and reinvested with abandoned rights. Of course this proposition has no bearing upon

the question of a right of action in this court for a disallowed part of a claim properly made.

Preliminary to the discussion of one or two remaining questions it is proper to give attention to the effect, if any, of Finding V, setting out, in compliance with a request of plaintiff, the usual Government form of bill of lading, used in these cases, and for that matter, in all shipments on Government account. Significance is attempted to be given to the use of this form and its descriptive words "public property" as importing a representation as to the ownership of the property, deceiving the carrier and leading to the application of an erroneous rate. In the light of the evidence and the statements of some of the witnesses, voluntarily placing themselves in the attitude of seriously reflecting on their own intelligence, it is difficult to regard the contention seriously.

Theoretically, if the theory is to be of any avail, the railroad companies, this plaintiff, for all these years, even if we do not go back of 1891 when the attention of counsel herein was first called to the matter, believed this class of property was Government-owned property and, not having informed us specifically as to just when they learned to the contrary, we must assume that it was not until this court decided the Chicago, Milwaukee & St. Paul case, even though no such question was in that case.

Counsel can scarcely contend that he did not know the facts as to this property in the light of his testimony and the finding based thereon that in conversations with comptrollers at that remote time he contended that land-grant rates were only applicable when "the freight was property of the United States and the personal property of Army officers was not such property," and in the light of his knowledge of the whole situation through succeeding years, including the decision of the comptroller in 1904, referred to by him, in which the comptroller was asked to and did apply a different rate to the excess over the regulation allowance all involved in the same shipment and ownership. And if counsel knew the situation all these twenty or twenty-five years, as he undoubtedly did, it would be an unjustified reflection on him to assume that he permitted the companies he represented to proceed to their disadvantage under such a mistake of fact. But further discussion is unjustified. There is no room for doubt that the railroad companies generally, plain-
32 tiff included, knew full well the character of this property. What some subordinate clerk doing merely clerical work knew or didn't know is highly immaterial. And the use of a Government form of bill of lading can certainly avail the plaintiff nothing unless it was deceived thereby as to its rights. Such a contention is wholly untenable.

The case is, in our opinion, clearly foreclosed by what has been said, indeed by much less than has been said, but, although not necessary to its determination, we want to suggest two further questions.

In Finding V, following the form of bill of lading, it is said that "No express contracts otherwise were made for the transportation here involved." We were requested to find that "no contracts other than the Government bill of lading were made."

The bills of lading made no contracts as to the specific compensation to be paid. Under them proper tariff rates were the basis and the law required the deduction therefrom of land-grant if the shipments were within the land-grant acts. It does not appear that anything but land-grant rates was ever applied in the settlements for transportation of this kind until subsequent to all the transportation involved in this case. It is conceded to have been the established practice to pay all railroads, the plaintiff included, at land-grant rate as Government-owned property. If, with knowledge of its true accepted without protest. When a shipment of such property was tendered or, limited to this case, when the carrier accepted them knowing that it would be paid at land-grant rates, made no claim for any more and, because of that fact and because when paid, it considered the transaction closed, it is to be assumed that it never expected to be paid any more. It knew this was the basis on which the Government expected it to furnish the transportation, it had acquiesced therein continuously and these particular transactions followed a long established practice. To us it seems that the facts raised an implied contract to furnish the transportation at land-grant rates.

A different view of contract relations would result as follows: The position of the Government, through its accounting officers, well known to the carriers, was that the class of property here involved was quasi public property and entitled to transportation at the same rate as Government-owned property. If, with knowledge of its true character and of this construction, it was accepted on a Government bill of lading as "public property," then, if the fact that a Government form of bill of lading was used is material, does it not follow that there was a resultant contract obligation on the part of the carrier to transport it as public property and at the rate applicable thereto?

After the decision by the Supreme Court of the Land Grant cases Congress appropriated to pay the railroads what might be found due for services rendered, limiting payments to 50 per cent of tariff rates, which "shall be accepted in full for all demands for said services" and providing:

That any such land-grant roads as shall file with the Secretary of the Treasury their written acceptance of this provision shall hereafter be paid for like services as herein provided.

Whether any such acceptances were ever filed is not shown and is, we think, immaterial.

33 Appropriation acts for each fiscal year thereafter appropriated for "Army transportation" one limiting payments to land-grant roads to 60 per cent of tariff rates but all others limiting it to 50 per cent and all providing that such payments should "be accepted as in full for all demands for such service." The appropriation act for the fiscal year 1910, the first year within which service sued for herein was rendered (35 Stat. 732–745) appropriated under the subhead "Transportation of the Army and its supplies" and provided "that in expending the money appropriated by this act" land-grant roads shall be paid for the transportation of

"troops and munitions of war and military supplies and property" only on the basis of such rate as the Secretary of War shall deem just and reasonable, "not to exceed 50 per centum of the compensation for such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation, *and the amount so fixed to be paid shall be accepted as in full for all demands for such service.*" (Italics ours.) The same provision is found in the appropriation acts for all years covered by the claim herein. The maximum within the limitation has always been paid.

We need not discuss established rules with reference to the use of appropriated funds. They are available only for the purposes for which appropriated and a given service can be paid for only from the available appropriation.

This appropriation was available for the transportation of officers' effects on change of station, was always construed as available therefor by officers authorized to determine such questions, was the only appropriation available for such purpose and every payment made to plaintiff on account of such transportation involved in this suit was made from that appropriation. It may safely be assumed that this plaintiff and all other railroads knew that this was the appropriation from which they were paid for such transportation, but that is in fact immaterial under the rule of presumption as to knowledge of the law.

And it can not affect the question to contend that this transportation is not within the classes of transportation referred to in the limiting clause or is not within the land-grant acts. The provision is, first, a limitation on the use of appropriated funds, and second, a condition attached to acceptance of payment therefrom. It in effect says to any land-grant road, when you accept a payment from this appropriation you must do so upon the express condition that it is in full for the services rendered. How then may it have the benefit of money, as to the expenditure of which Congress is authorized to impose conditions, and repudiate the condition?

For the reasons stated in the opinion in Baltimore and Ohio Railroad Company v. the United States, supra, and in this opinion, we conclude that the plaintiff can not recover. Its petition will therefore be dismissed with judgment against the plaintiff for cost of printing the record to be taxed by the clerk.

Hay, Judge, Booth, Judge, and Campbell, Chief Justice, concur.

Barney, Judge, did not participate.

34 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Fifth day of May, A. D., 1919, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the Oregon-Washington Railroad and Navigation Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this

action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the Oregon-Washington Railroad and Navigation Company, as aforesaid, the sum of One Hundred and Thirty-six Dollars and thirty-one cents ($136.31), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VI. *Proceedings After Entry of Judgment.*

On May 20, 1919, the claimant filed a motion for amended and additional findings of fact. This motion was overruled by the Court on June 2, 1919.

VII. *Claimant's Application for, and Allowance of, an Appeal.*

Comes now the claimant, by its attorneys, and prays the allowance of an appeal to the Supreme Court of the United States from the judgment of the Court rendered herein May 5, 1919.

Respectfully submitted,

HARR & BATES,
Attorneys for Claimant.

Filed June 17, 1919.

Ordered:
That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

June 17, 1919.

35 Court of Claims.

No. 33183.

THE OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court, by Downey, J.; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Nineteenth day of June, A. D., 1919.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,181. Court of Claims. Term No. 426. The Oregon-Washington Railroad and Navigation Company, appellant, vs. The United States. Filed June 25th, 1919. File No. 27,181.